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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL LODGING BY PETITIONER

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

31 MAR 1988

Honorable Augustus F. Hawkins
Chairman
Education and Labor Committee
2181 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Hawkins:

This letter presents the views of the Department of Justice on H.R. 5, proposed legislation that would authorize numerous education grants.

Racially-Based Grants

Part E of Title VII entitled "Native Hawaiian Education Programs" would authorize education grants for the exclusive benefit of Native Hawaiians. Part E raises serious questions under the equal protection component of the fifth amendment, because it would authorize programs for the exclusive benefit of Native Hawaiians, and would define "Native Hawaiian," in pertinent part, as "any individual who is . . . a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii." Under the Supreme Court's cases, an express racial classification such as that found in Part E (1) may be employed only to further a compelling governmental interest and (2) must be narrowly tailored to further that interest. See Wygant v. Jackson Board of Education, 106 S.Ct. 1842, 1846 (1986) (plurality) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984), and Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)). Part E does not further a compelling governmental interest.

First, the Supreme Court has identified rectification of prior discrimination by the governmental unit involved as the only governmental interest that is clearly sufficiently compelling to justify reliance on racial classifications. In this regard, the "Court never has held that societal discrimination alone is sufficient to justify a racial classification." Wygant, 106 S.Ct. at 1847. The section of the bill setting forth Congress' findings, however, recites important, but nonetheless only societal concerns, e.g. that Native Hawaiians score below national norms on standardized achievement tests and are underrepresented in the uppermost achievement levels. There is no evidence in Part E, or to our knowledge, elsewhere, that these conditions resulted from past governmental discrimination against Native Hawaiians, either by the State of Hawaii or the United States. Absent such evidence, there is no compelling interest that justifies the use of a racial classification. To be sure, Congress may properly seek to address the problems of those suffering from the disadvantages recited, but it must do so by racially neutral means.

Although never squarely addressed by a majority of the Court, another possible governmental interest that may be sufficiently compelling under certain circumstances to support reliance on race is diversity. Cf. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, Justice Powell's opinion stated that the goal of achieving diversity among university students justified consideration of race as a factor in admissions, but not the use of quotas. The diversity rationale is not applicable to Part E. The bill would not merely permit race to be taken into account to admit Native Hawaiians to educational programs in which they were under-represented. Rather, the bill would establish programs for the benefit of Native Hawaiians to the exclusion of all other racial groups, thus precluding racial diversity. In this regard, the constitutionality of the proposed bill appears to be governed by Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). In Hogan, the Court held that a state university's admissions policy of excluding men from its nursing school violated the equal protection clause of the fourteenth amendment. There was no showing that the state's policy could be said to remedy prior governmental discrimination against women in admissions to nursing schools. Thus, under the intermediate scrutiny employed by the Court in sex discrimination cases, no "important" state interest justified the classification. A fortiori, Part E's racial classification cannot be justified since it is subject to an even higher level of scrutiny.

We also do not believe that a racial preference can be justified on the basis of a Federal trust responsibility to Native Hawaiians, analogous to the trust obligation to Indians approved in Morton v. Mancari, 417 U.S. 535 (1974). The Senate committee report on S. 360 attempts to derive such trust responsibility from the Hawaii Statehood Act, which conveyed land to Hawaii on the condition that the land and any resulting income be used for inter alia improvement of the conditions of Native Hawaiians.

We do not believe this argument can justify a preference for education funds for Indians. Even if the Hawaii Statehood Act did justify the selective use for Native Hawaiians of certain lands and the income derived from them, that would not justify discrimination in the allocation of federal education funds. Moreover, we note that the preference approved by the Supreme Court in Morton v. Mancari involved special circumstances not present here. The Supreme Court relied upon the fact that the

employment preference for Indians in the Bureau of Indian Affairs was not racial, but tribal, and therefore was justifiable as a means of promoting Indian self-government. As the Court stated: "the legal status of the BIA is truly sui generis." Id. at 554.

For these reasons, if the bill is to be enacted, it should be redrafted to establish educational programs open to all those who score below national norms on standardized achievement tests, are disproportionately from lower socioeconomic backgrounds, etc., without reference to their race. This would constitutionally accomplish the true purpose of the bill; namely, to help those who are socially and economically disadvantaged.

Appointment of Officers of Indian Schools

Part D of Title VIII, entitled the "Native American Indian School Act," permits the "establishment or recognition of not more than five Native American Indian Schools on Indian lands to serve Indian students residing on Indian lands." Sec. 8403(a). Interested Indian tribes are to petition for authority to establish such schools from the Secretary of the Interior.

Each established school will be a separate corporation, governed by a Board of Trustees. The Board has power to formulate policy, direct the management and make bylaws and rules of the school. The Board also appoints a Superintendent who serves as the chief executive officer of the school. The composition of the Board and "the methods to be used in electing the members" are indicated in a petition from an Indian tribe to the Secretary of the Interior.

The proposed bill is not clear as to the extent to which the Indian schools operate autonomously of federal standards. Depending upon the interpretation given to this aspect of the proposed bill, it may raise questions under the Appointments Clause of the United States Constitution.[1] Officials who exercise "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976), must be appointed in accordance with the procedures set forth in the Appointments Clause. The schools are funded with money made available by the Secretary of the Interior. Secs. 8412(b) & 8415. While the bill appears to leave operation of the school largely to the discretion of the Board, two provisions raise doubt as to this conclusion. First, the bill permits removal of a member of the Board for "just and sufficient cause." While the bill does not indicate who may exercise removal power, nor what standards

[1] The Board of Trustees are required to serve without compensation, except for travel expenses. Members of the Board may therefore not be officers since their position does not confer emoluments. See United States v. Germaine, 99 U.S. 508, 511-12 (1878). Nonetheless, the position of School Superintendent clearly has all the requisites of an officer and would have to be appointed in accordance with the Appointments Clause.

are to be applied in exercising the power, we assume removal is conferred on the Secretary of the Interior. Second, the Secretary of Interior must develop criteria for tribal applications to establish schools and procedures for such establishment, which possibly could be used to regulate operation of the schools.

To ensure that the officials that govern the schools are not "Officers of the United States," who must be appointed in accordance with the Appointments Clause, the bill should be changed to clarify that the schools will operate autonomously.

Recruitment of Minority Teachers

Title II of H.R. 5, entitled the "Critical Skills Act," provides for the Secretary of Education to make grants to the States to strengthen the skills of teachers and the quality of instruction in mathematics and science in the elementary and secondary schools. The Act provides that funds distributed by the states to local education agencies may be used for a variety of activities, one of which is the "recruitment or retraining of minority teachers to become mathematics and science teachers." Sec. 2090(a)(2). Section 2100 also provides that state and local funds may be used for "recruitment and inservice of minority teachers."

We do not interpret these provisions to require or permit state and local agencies to use funds in a manner that confers preferences on minority teachers. Such an interpretation would create serious problems in terms of equal protection principles. See e.g. Wygant v. Jackson Board of Education, 106 S.Ct. 1842, (1986)(plurality) and Fullilove v. Klutznick, 448 U.S. 448 (1980). Rather, we understand these provisions to make clear that funds may be used to engage in active recruiting of minority teachers and to provide retraining and other employment opportunities to minority teachers on a neutral basis with nonminority teachers.

The Office of Management and Budget has advised that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General
Office of Legislative Affairs

No. 534

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

Office - Supreme Court, U.S.
FILED
OCT 30 1956
JOHN T. FEY, Clerk

PRESTON ALLEN, suing for himself and other American Indians similarly situated,
Petitioner

v.

PORTER L. MERRELL, individually and as County Clerk, Duchesne County, Utah

On Petition for a Writ of Certiorari to the Supreme Court of Utah

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 534

PRESTON ALLEN, suing for himself and other American Indians similarly situated,
Petitioner

v.

PORTER L. MERRELL, individually and as County Clerk, Duchesne County, Utah.

On Petition for a Writ of Certiorari to the Supreme Court of Utah.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

---

1. The petition for certiorari in this case raises questions as to the validity, both on its face and in its application, of a statute of the State of Utah which provides: "Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter [dealing with voting], unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation". (Utah Code Annotated, 1953, Sec. 20-2-14, par. 11).

It appears from the record that on March 23, 1956, the Attorney General of the State of Utah ruled that "Indians who live on the reservations are not entitled to vote in Utah and a Board of Co. y Commissioners has no duty to provide them with voting facilities." It also appears that although the statute refers generally to "any person living upon any Indian or military reservation", the statute is being

applied only to Indians residing on reservations and not to non-Indians residing on reservations (R. 8). In its per curiam opinion and order of October 25, 1956 (R. 19-20), the state Supreme Court denied relief, notwithstanding the uncontradicted allegations to that effect. It is settled, of course, that a law, non-discriminatory on its face, which is discriminatory in its operation violates the federal Constitution. Yick Wo v. Hopkins, 118 U.S. 356, 369; Griffin v. Illinois, 351 U.S. 12, 17, and cases there cited. Accordingly, the petition for certiorari presents, at the very least, a substantial question as to the validity of the Utah statute here involved in its practical application to petitioner and the similarly situated Indians on whose behalf this class suit was brought.

The Government submits, therefore, that review of this case by the Court is clearly warranted and, indeed, necessary in order to prevent frustration of the constitutional rights asserted by petitioner.

2. As the opinion of the Supreme Court of Utah states (R. 19), the last registration dates prior to the forthcoming election are October 30 and 31. In order that any judgment upholding petitioner's rights should be fully effective, it is essential that petitioner and other Indians similarly situated should be allowed to register and vote, subject to the final outcome of this litigation. At stake here are important constitutional rights which would be irretrievably lost, so far as the November 6 election is concerned, if interlocutory judicial relief is not immediately granted. If petitioner and other Indians living on reservations in Utah are allowed to register and vote, and their ballots are segregated and impounded pendente lite, no interest of the State would be impaired. On the contrary, the State, as well as the Federal Government, undoubtedly is concerned that the right to suffrage should not be improperly denied or lost.

Accordingly, we think that considerations of equity and public policy emphasize the importance of early consideration and decision of this case, and of issuance of such interlocutory relief as is necessary and proper. To that end, the Government suggests (1) that the petition for certiorari be granted forthwith, and the case be set down for early hearing; and (2) that the Court enter a stay order as requested in petitioner's motion (pp. 7-9), except in so far as petitioner seeks to have impounded the ballots of non-Indian voters.

The general power of the Court to afford such relief, incident to its power to review the judgment of the Supreme Court of Utah, is evidenced by the authorities cited in petitioner's memorandum in support of his motion. We think that no more need be added on that phase of the case.

That this case involves the right to vote does not limit the Court's general authority and duty to issue writs necessary to preserve its jurisdiction and to render a full and effective judgment. In recent years the Court has exercised such power (see Johnson v. Stevenson, 335 U.S. 801), and it is fair to say that there is now little question of the Court's authority to preserve voting rights by injunction or other mandatory relief. It is true that general statements can be found to the effect that equity does not protect "political rights" (see Giles v. Harris, 189 U.S. 475, 486-488; 43 Corp. Jur. Sec. p. 643), but the unfolding development of the law has limited the sweep of such dicta.[1/] Today, the right of voting stands on no lower plane than the

1/ In Giles v. Harris, relief was denied because the Court considered that it could not effectively redress the asserted violation of constitutional rights. In the instant case, however, there is no comparable question as to the breadth of the relief sought. See also Hume v. Mahan, 1 F. Supp. 142, 147 (E.D. Ky.), reversed on other grounds, 287 U.S. 575.

multitude of other civil rights which federal courts customarily and properly enforce where judicial remedies, including injunctive relief, can be effective.

The type of preliminary judicial relief which the Government and petitioner urge can be made effective here. Under Utah law, if persons in petitioner's class present themselves for registration by tomorrow, October 31, they can be registered for the coming election.[2/] A list will be prepared by the registration agent by the coming Saturday, November 3. This list will be posted to enable any qualified elector to object to the right to vote of any person whose name appears on the list. On election day, challenges may be made to the right of any person to vote, and separate lists of challenged voters are maintained.[3/] The ballots are to be retained for at least twelve months. Utah Code Ann. Secs. 20-2-6, 20-2-16, 20-2-17, 20-7-18, 20-7-32, 20-7-35, 20-7-38. Although the Utah statute apparently makes no provision for the segregation of ballots cast by challenged voters, we see no reason why, under this Court's decree, the election officials cannot retain the challenged ballots in separate packages, if this Court shall not have determined the merits of the case by November 6. In short, we have found nothing in the structure of the Utah election laws which would bar or conflict with the suggested interlocutory relief.

2/ The Utah Supreme Court has said that, if a voter who applies for registration is improperly refused registration by a registration official, he will not be deprived of his right to vote (if he appears to vote) by virtue of the failure of the official to mark him as a registered voter. Earl v. Lewis, 28 Utah 116, 126.

3/ The Utah statutes are ambiguous as to whether the election officials were intended to be the sole and ultimate judges of a challenge made at the polls, without judicial determination of the right to vote (Utah Code Ann. § 20-7-18), but nothing in the Utah statutes would prohibit an election official, in compliance with a decree of this Court, from accepting a ballot from a challenged voter, segregating it and impounding it pending the final outcome of the litigation.

CONCLUSION

The petition for certiorari should be granted forthwith; the case should be set down for early hearing; and the Court should grant, before October 31, if possible, interlocutory relief of the type described above.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 30, 1956.

FILED

MAY 10 1999

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

THE UNITED STATES OF AMERICA, Plaintiff, v. DAY COUNTY, SOUTH DAKOTA; DAY COUNTY COMMISSION; LEONARD NAESSIG, LINDA WALTERS, ORVILLE HASELHORST, DARRYL HILLDEBRANT, and DOUG SMEINS each in his official capacity as Day County Commissioner; ENEMY SWIM SANITARY DISTRICT; THOMAS KNUTSON, DAVID BENIKE, and RAYMOND FOSTER, each in his official capacity as Enemy Swim Sanitary District Trustee, Defendants.	No. CV99-1021

COMPLAINT

The United States of America, plaintiff herein, alleges:

1. This action is brought on behalf of the United States by the Attorney General pursuant to 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), 1971(c), Sections 2 and 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 and 1973j(d), and pursuant to 28 U.S.C. 2201 to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. 1971(d), 42 U.S.C. 1973j(f), and 28 U.S.C. 1345.

3. Defendant Day County is a political and geographical subdivision of the State of South Dakota and exists under the laws of that state.

4. Defendant Day County Commission is the governing body of Day County, established under the laws of the State of South Dakota. The commission is responsible for exercising the powers inherent in conducting county business including the approval for incorporating sanitary districts located in the county.

5. Defendants Leonard Naessig, Doug Smeins, Orville Hasslehorst, Linda Walters, and Darryl Hildebrant are the duly elected members of the Day County Commission. Each of these defendants is sued in his official capacity.

6. Defendant Enemy Swim Sanitary District is a political and geographical subdivision of the State of South Dakota and exists under the laws of that state. Defendant Enemy Swim Sanitary District is charged with the responsibility of conducting the business of the sanitary district.

7. Defendants Thomas Knutson, David Benike, and Raymond Foster are the duly elected members of the Enemy Swim Sanitary District. Each member is eligible to vote on all matters presented to the sanitary district. Each of these defendants is sued in his official capacity.

8. A sanitary district is a governmental subdivision of South Dakota and a public body, corporate and politic. Sanitary districts have the power to construct and operate storm sewers, sanitary sewers, and waste disposal systems. Enemy Swim Sanitary District is governed by a board of three trustees who are elected at-large and serve three-year staggered terms. South Dakota Codified Laws ("SDCL") 34A-5-1 to 34A-5-56.

9. Under South Dakota law, the Day County Commission is required to receive requests to incorporate a sanitary district within the boundaries of Day County and shall make an order declaring that with the assent of the voters, the territory shall become an incorporated sanitary district "if the board shall be satisfied that the requirements of this chapter have been fully complied with." SDCL 34A-5-7 (1997).

10. In 1991, the Day County Commissioners approved the incorporation of Enemy Swim Lake Sanitation District. The boundaries of the district included all lakefront property of Enemy Swim Lake and Campbell Slough, including land owned and held in trust for Native Americans. All qualified persons of voting age residing in the district were allowed to vote in elections regarding establishment of the sanitary district and in the subsequent election of trustees.

11. On December 4, 1991, the Circuit Court for the Fifth Judicial District for the State of South Dakota in Benike v.

Enemy Swim Sanitation District, Case No. 91-98, dissolved the sanitation district because the petition for incorporation failed to meet the South Dakota statute's requirements regarding the establishment of a sanitary district, particularly the requirement that one-third of voting age citizens in the district must sign the petition. See SDCL 34A-5-7 (1997).

12. In February 1992, a former trustee of the dissolved sanitation district submitted a petition to the Day County Commissioners requesting that a sanitary district around Enemy Swim Lake and Campbell Slough again be incorporated. The boundaries of the proposed district included all lakefront property of Enemy Swim Lake and Campbell Slough, including land owned and held in trust for Native Americans.

13. The February 1992 petition for incorporation met all of the South Dakota statute's requirements regardihg the establishment of a sanitary district. See SDCL 34A-5-7 (1997). Members of the community who are not Native American expressed opposition to the February 1992 petition, however, because it would include Native American voters in the district. The Day County Commission failed to approve the February 1992 petition for incorporation.

14. Prior to Defendant Day County Commission's failure to approve the February 1992 petition for incorporation, the Commissioners had a practice of approving the incorporation of

a sanitary district when the submitting party met the requirements of South Dakota's sanitary district statute, SDCL 34A-5-7 (1997).

15. On July 27, 1993, the Day County Commissioners approved the incorporation of a different sanitary district, the defendant Enemy Swim Sanitary District. The petition for incorporation of defendant Enemy Swim Sanitary District expressly excluded from the boundaries of the sanitary district land owned by or held in trust for Native Americans.

16. The boundaries of defendant Enemy Swim Sanitary District are comprised of several noncontiguous pieces of land around Enemy Swim Lake and Campbell Slough -- approximately thirteen percent of the land around these two lakes. None of the land owners or residents are Native American. See Attachment A to this Complaint.

17. After the election of Defendant Enemy Swim Sanitary District Trustees in October 1993, Native Americans repeatedly have requested from Defendant Enemy Swim Sanitary District and Defendant Enemy Swim Sanitary District Trustees ("Sanitary District Defendants") that the district include Native American land in the Enemy Swim Sanitary District and that Native Americans have the opportunity to participate in electing the governing representatives of the sanitary district. Sanitary District Defendants have refused to include Native American land in the sanitary district. Sanitary District Defendants

continue to maintain a district that prohibits Native Americans from having the opportunity to participate in the sanitary district election process.

18. As a result of Defendants' actions, Native Americans residing on the land around Enemy Swim Lake and Campbell Slough cannot vote in Enemy Swim Sanitary District elections or participate in the decision-making process for the district.

19. There has been racial hostility in the community aimed at Native Americans concerning inclusion of Native American voters in the Enemy Swim Sanitary District.

20. Native Americans in South Dakota and Day County historically have been subject to discriminatory treatment, including a long history of official discrimination in voting.

21. The intentional exclusion of Native Americans from the sanitary district, the oddly-shaped and noncontiguous nature of the district, the failure to approve a sanitary district that included all people around the lake, the continuing refusal to include Native American lands in the sanitary district, the hostility against Native Americans, and the other allegations contained in paragraphs 9-20 of this Complaint demonstrate a discriminatory purpose to deny Native Americans the opportunity to participate in sanitary district elections.

22. Defendants' actions described in paragraphs 9-21 above violate Section 2 of the Voting Rights Act, 42 U.S.C.

1973, and the rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution in that the actions have been taken with the purpose and effect of denying the right of Native Americans to vote in sanitary district elections on account of race or color.

23. Defendants' actions described in paragraphs 9-21 above violate 42 U.S.C. 1971(a)(1) and 1971(a)(2)(A) in that the actions have been taken with the purpose and effect of denying the right to vote to Native Americans that are otherwise qualified to be sanitary district residents and voters.

24. Unless enjoined by an order of this Court, Defendants will continue to maintain Defendant Enemy Swim Sanitary District for the purpose and with the effect of denying Native Americans the rights guaranteed by 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), Section 2 of the Voting Rights Act, '42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

WHEREFORE, the United States prays that the Court enter a judgment:

1) Declaring that the Enemy Swim Sanitary District as presently comprised violates 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the guarantees of the Fourteenth and Fifteenth Amendments of the United States Constitution;

2) Enjoining Defendants, their successors in office, their agents and all person acting in concert with them, from incorporating a sanitary district around and near Enemy Swim Lake and Campbell Slough that excludes Native Americans from voting and otherwise participating in the sanitary district on account of race or color;

3) Enjoining Defendants, their successors in office, their agents and all persons acting in concert with them, from administering any elections, including elections for trustees, of any sanitary district around and near Enemy Swim Lake and Campbell Slough that excludes Native Americans from voting and otherwise participating in the sanitary district on account of race or color;

4) Ordering Defendants, their successors in office, their agents and all persons acting in concert with them, to reincorporate the Enemy Swim Sanitary District to include Native Americans that reside around and near Enemy Swim Lake and Campbell Slough; and

5) Ordering Defendants, their successors in office, their agents and all person acting in concert with them, to hold elections in the newly-comprised district as promptly as possible.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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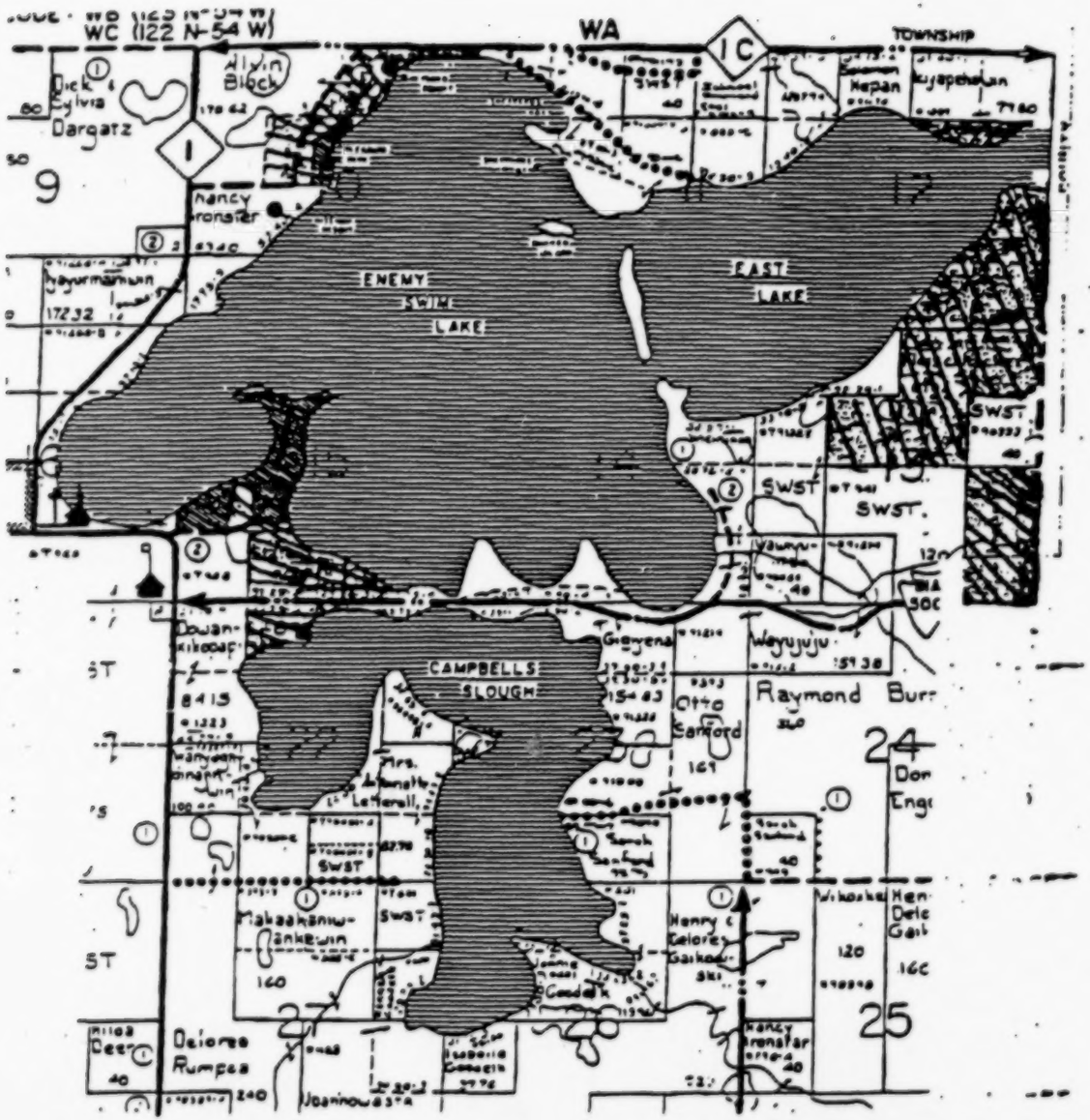
ATTACHMENT A

Legend -- Red Cr ss Hatch
Repres..its Enemy
Swim Sanitary District



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DEPARTMENT OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES

PURPOSE: To reaffirm the Department's recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations and to reaffirm adherence to the principles of government-to-government relations; to inform Department personnel, other federal agencies, federally recognized Indian tribes, and the public of the Department's working relationships with federally recognized Indian tribes; and to guide the Department in its work in the field of Indian affairs.

I. INTRODUCTION

From its earliest days, the United States has recognized the sovereign status of Indian tribes as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Our Constitution recognizes Indian sovereignty by classing Indian treaties among the "supreme Law of the land," and establishes Indian affairs as a unique area of federal concern. In early Indian treaties, the United States pledged to "protect" Indian tribes, thereby establishing one of the bases for the federal trust responsibility in our government-to-government relations with Indian tribes. These principles continue to guide our national policy towards Indian tribes.

A. THE EXECUTIVE MEMORANDUM ON GOVERNMENT-TO-GOVERNMENT RELATIONS BETWEEN THE UNITED STATES AND INDIAN TRIBES

On April 29, 1994, at a historic meeting with the heads of tribal governments, President Clinton reaffirmed the United States'

"unique legal relationship with Native American tribal governments" and issued a directive to all executive departments and agencies of the Federal Government that:

As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

President Clinton's directive requires that in all activities relating to or affecting the government or treaty rights of Indian tribes, the executive branch shall:

1) operate within a government-to-government relationship with federally recognized Indian tribes;

2) consult, to the greatest extent practicable and permitted by law, with Indian tribal governments before taking actions that affect federally recognized Indian tribes;

3) assess the impact of agency activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;

4) remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of the tribes; and

5) work cooperatively with other agencies to accomplish these goals established by the President.

The Department of Justice is reviewing programs and procedures to ensure that we adhere to principles of respect for Indian tribal governments and honor our Nation's trust responsibility to Indian tribes. Within the Department, the Office of Tribal Justice has been formed to coordinate policy towards Indian tribes both within the Department and with other agencies of the Federal Government, and to assist Indian tribes as domestic dependent nations within the federal system.

B. FEDERAL INDIAN SELF-DETERMINATION POLICY

President Clinton's executive memorandum builds on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents affirmed the fundamental policy of federal respect for tribal self-government. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian tribes and reaffirmed "the government-to-government basis" for dealing with Indian tribes. President Bush recognized that the Federal Government's "efforts to increase tribal self-governance have brought a

renewed sense of pride and empowerment to this country's native peoples."

II. PRINCIPLES OF INDIAN SOVEREIGNTY AND THE TRUST RESPONSIBILITY

Though generalizations are difficult, a few basic principles provide important guidance in the field of Indian affairs: 1) the Constitution vests Congress with plenary power over Indian affairs; 2) Indian tribes retain important sovereign powers over "their members and their territory," subject to the plenary power of Congress; and 3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where Congress has provided otherwise.

III. DEPARTMENT OF JUSTICE RECOGNITION OF INDIAN SOVEREIGNTY AND THE FEDERAL TRUST RESPONSIBILITY

The Department resolves that the following principles will guide its interactions with the Indian tribes.

A. THE SOVEREIGNTY OF INDIAN TRIBES

The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the United States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance.

The Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes. For example, the Department reviews proposed legislation, administers funds that are available to tribes to build their capacity to address crime and crime-related problems in Indian country, and in conjunction with the Bureau of Indian Affairs and tribal police, provides essential law enforcement in Indian country. The Department represents the United States, in coordination with other federal agencies, in litigation brought for the benefit of Indian tribes and individuals, as well as in litigation by Indian tribes or individuals against the United States or its agencies. In litigation as in other matters, the Department may take actions and positions affecting Indian tribes with which one or more tribes may disagree. In all situations, the Department will carry out its responsibilities consistent with the law and this policy statement.

B. GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS WITH INDIAN TRIBES

In accord with the status of Indian tribes as domestic dependent

nations, the Department is committed to operating on the basis of government-to-government relations with Indian tribes.

Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes. Each component will conduct such consultation in light of its mission. In addition, the Department has initiated national and regional listening conferences and has created the Office of Tribal Justice to improve communications with Indian tribes. In the Offices of the United States Attorneys with substantial areas of Indian country within their purview, the Department encourages designation of Assistant U.S. Attorneys to serve as tribal liaisons.

In order to fulfill its mission, the Department of Justice endeavors to forge strong partnerships between the Indian tribal governments and the Department. These partnerships will enable the Department to better serve the needs of Indian tribes, Indian people, and the public at large.

C. SELF-DETERMINATION AND SELF-GOVERNANCE

The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

D. TRUST RESPONSIBILITY

The Department acknowledges the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. In a broad sense, the trust responsibility relates to the United States' unique legal and political relationship with Indian tribes. Congress, with plenary power over Indian affairs, plays a primary role in defining the trust responsibility, and Congress recently declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601.

The term "trust responsibility" is also used in a narrower sense to define the precise legal duties of the United States in managing property and resources of Indian tribes and, at times, of individual Indians.

The trust responsibility, in both senses, will guide the Department in litigation, enforcement, policymaking and proposals for

legislation affecting Indian country, when appropriate to the circumstances. As used in its narrower sense, the federal trust responsibility may be justiciable in some circumstances, while in its broader sense the definition and implementation of the trust responsibility is committed to Congress and the Executive Branch.

E. PROTECTION OF CIVIL RIGHTS

Federal law prohibits discrimination based on race or national origin by the federal, state and local governments, or individuals against American Indians in such areas as voting, education, housing, credit, public accommodations and facilities, employment, and in certain federally funded programs and facilities. Various federal criminal civil rights statutes also preserve personal liberties and safety. The existence of the federal trust responsibility towards Indian tribes does not diminish the obligation of state and local governments to respect the civil rights of Indian people.

Through the Indian Civil Rights Act, Congress selectively has derived essential civil rights protections from the Bill of Rights and applied them to Indian tribes. 25 U.S.C. 1301. The Indian Civil Rights Act is to be interpreted with respect for Indian sovereignty. The primary responsibility for enforcement of the Act is invested in the tribal courts and other tribal fora. In the criminal law context, federal courts have authority to decide habeas corpus petitions after tribal remedies are exhausted.

The Department of Justice is fully committed to safeguarding the constitutional and statutory rights of American Indians, as well as all other Americans.

F. PROTECTION OF TRIBAL RELIGION AND CULTURE

The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. The Department seeks to ensure that American Indians are protected in the observance of their faiths. Decisions regarding the activities of the Department that have the potential to substantially interfere with the exercise of Indian religions will be guided by the First Amendment of the United States Constitution, as well as by statutes which protect the exercise of religion such as the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

The Department also recognizes the significant federal interest in aiding tribes in the preservation of their tribal customs and traditions. In performing its duties in Indian country, the Department will respect and seek to preserve tribal cultures.

IV. DIRECTIVE TO ALL COMPONENTS OF THE DEPARTMENT OF JUSTICE

The principles set out here must be interpreted by each component of the Department of Justice in light of its respective mission. Therefore, each component head shall make all reasonable efforts to ensure that the component's activities are consistent with the above sovereignty and trust principles. The component heads shall circulate this policy to all attorneys in the Department to inform them of their responsibilities. Where the activities and internal procedures of the components can be reformed to ensure greater consistency with this Policy, the component head shall undertake to do so. If tensions arise between these principles and other principles which guide the component in carrying out its mission, components will develop, as necessary, a mechanism for resolving such tensions to ensure that tribal interests are given due consideration. Finally, component heads will appoint a contact person to work with the Office of Tribal Justice in addressing Indian issues within the component.

V. DISCLAIMER

This policy is intended only to improve the internal management of the Department and is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.

_____ Date:_____

Janet Reno
Attorney General

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 30, 1989

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in response to your letter of November 29, 1988, to Douglas W. Kmiec, Assistant Attorney General for the Office of Legal Counsel (OLC). Your letter requested copies of all documents that OLC has prepared concerning the Indian preference provisions in Public Law 100-297 (the Act). The only document that is responsive to your request is a memorandum, dated November 9, 1988, from Mr. Kmiec to Diane Weinstein, Acting General Counsel, Department of Education (the OLC Opinion).[1] The OLC Opinion provides legal advice on the constitutionality of the preferences contained in the Act.

It is the established policy and practice of the Department of Justice that its legal advice to clients within the executive branch is generally confidential. The Department's established method for communicating to Congress its opinion on legal issues is to provide a letter or testimony setting forth the Department's legal position.

With that in mind, and without waiving the confidentiality of the advice contained in the OLC Opinion, on November 30, 1988, a representative of OLC briefed a member of your staff on the Department's position on the constitutionality of the preferences contained in the Act. As a further effort to accommodate your

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[1] We do not read your request for documents prepared by the Office of Legal Counsel to include drafts prepared by staff attorneys, since these have no official force or standing. Nor do we read your request to include documents prepared at the bill comment stage, since your letter referred only to implementation of Public Law 100-297.

oversight interest, we now offer the following written statement of the Department's position.

We believe that the preference granted by the Act to those who are actual members of an Indian tribe is constitutional under Morton v. Mancari, 417 U.S. 535 (1974). Those preferences for Indians, however, that do not depend, even in part, upon membership in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under that decision, and accordingly must be examined under Supreme Court precedent governing the use of racial classifications.

Section 5341(c) of the Act provides that the Secretary of Education "shall give a preference to Indians in all personnel actions" within the OIE. Section 5351(4) in turn defines "Indian" for purposes of the Act as including any individual who is:

> (A) a member of an Indian tribe, band, or other organized group of Indians (as defined by the Indian tribe, band or other organized group), including those Indian tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside,
>
> (B) a descendant, in the first or second degree, of an individual described in subparagraph (A),
>
> (C) considered by the Secretary of the Interior to be an Indian for any purpose,
>
> (D) an Eskimo, Aleut, or other Alaska Native, or
>
> (E) is determined to be an Indian under regulations promulgated by the Secretary [of Education] after consultation with the National Advisory Council on Indian Education.

The inclusion in subsection (C) of any individual who is "considered by the Secretary of the Interior to be an Indian for any purpose" in effect incorporates into Section 5351 the definition of "Indian" contained in 25 C.F.R. 5.1 (1988):

> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
>
> (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
>
> (c) All others of one-half or more Indian blood of tribes indigenous to the United States;

> (d) Eskimos and other aboriginal people of Alaska; and
>
> (e) For two (2) years or until the Osage Tribe has formally organized, whichever comes first, effective September 15, 1986, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an Act of Congress.

Thus, the Act includes within the definition of "Indian" three classifications that are purely racial: "a descendant, in the first or second degree," of members of organized Indian groups (evidently without regard to their continued membership in an organized Indian group), "Eskimo, Aleut, or other Alaska Native," and, through the incorporated Interior regulations, persons "of one-half or more Indian blood."[2] Section 5351(4)(B) and (D); 25 C.F.R. 5.1(b), (c) and (d).[3]

Racial classifications are constitutionally suspect. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Although Indians enjoy a special position under the law, the Supreme Court has consistently emphasized that racially-based legislation is not automatically exempt from constitutional prohibitions on racial discrimination simply

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[2] In an effort to give the incorporated regulations a constitutional construction, we considered whether the reference in 25 C.F.R. 5.1(c) to "tribes indigenous to the United States" could be construed as a tribal, rather than a racial, classification. We concluded that it could not: it is, rather, a mere limitation on the racial classification of those persons of "one-half or more Indian blood," not a separate requirement of tribal membership. Any other reading would make the "membership" language of 25 C.F.R. 5.1(a) mere surplusage.

[3] We note that the incorporation of the Interior regulations into Section 5351 results in the inclusion of two categories of "descendants," each defined in slightly different terms. Compare Section 5351(4)(B) and 25 C.F.R. 5.1(b). Similarly, there are two slightly different Eskimo categories defined in Section 5351(4)(D) and 25 C.F.R. 5.1(d). For purposes of this opinion, we treat the duplicate definitions as functionally equivalent: all, moreover, constitute racial classifications.

In particular, 25 C.F.R. 5.1(b) is not saved by its reference to residence "within the present boundaries of any Indian reservation;" that reference is to residence as of 1934, and does not impose any requirement that current beneficiaries of the preference reside on an Indian reservation.

because the legislation involves or benefits Indians. E.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 500-01 (1979); Craig v. Boren, 429 U.S. 190, 209 n.22 (1976) (laws which discriminate with respect to Indians on racial grounds are of "questionable constitutionality").

In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the Indian preference contained in the Indian Reorganization Act of 1934 against a limited constitutional challenge. In contrast to the definition of "Indian" at issue here, the regulations in Mancari defined eligibility for the preference as follows:

> To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.

417 U.S. at 553 n.24, quoting 44 BIAM 335, 3.1 (emphasis supplied). The Court explicitly relied on this definition to uphold the preference against the claim that it was racially discriminatory:

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . .
>
> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as Indians. In this sense, the preference is political rather than racial in nature.

417 U.S. at 554 and 553 n.24 (emphasis supplied).[4] Moreover, it is significant that throughout its constitutional discussion the Court refers to those Indians receiving benefits as "tribal Indians."[5] E.g., id. at 552-55.

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[4] Thus, although the classification contained a racial element (the "Indian blood" requirement), the Court held that the classification's further requirement of tribal membership was sufficient to save the preference.

[5] The Supreme Court also noted that the preference only applied to employment in the Indian service and therefore was reasonably and directly related to a legitimate, nonracially (continued...)

The Supreme Court has repeatedly relied upon this distinction between tribal and racial classifications in upholding Indian preferences against attack on racial discrimination grounds. E.g., Washington v. Yakima Indian Nation, supra, 439 U.S. at 500-01 ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive," quoting Mancari); United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians" . . .,'" quoting Mancari); Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 480 (1976) ("statutes . . . according special treatment to Indian tribes and reservations" are "neither 'invidious' nor 'racial,'" citing Mancari); Fisher v. District Court, 424 U.S. 382, 390 (1976) (statute granting exclusive jurisdiction over certain claims to the Cheyenne Tribal Court, challenged as "impermissible racial discrimination," upheld on grounds that jurisdiction "does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.").

As noted above, however, certain of the classifications contained in the Act and incorporated regulations are by their terms not tribal, but rather are "directed towards a 'racial' group consisting of Indians," and include Indians and Eskimos as members of "discrete racial groups." Unlike the situation in Mancari, an individual could be a member of one of the classifications included or incorporated in the Act solely on the basis of racial characteristics, without regard to membership in a tribe or other organized Indian group. Those classifications are thus outside the holding in Mancari, and are subject to the

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[5](...continued)
based goal -- that of furthering the cause of Indian self-government. Id. at 554. We do not believe that by adducing this additional distinction the Court implied that Indian preferences based on racial as opposed to tribal classifications would be constitutional if confined to positions that relate to Indian self-government. First, the Court made this additional distinction in the course of observing that even the tribal preference at issue would raise more difficult questions if applied to all government positions. Second, a broad racial preference in favor of Indians would not promote self-government because some non-tribal Indians evidently do not participate in tribal self-government. Third, the Court, in decisions since Mancari, has repeatedly invoked the racial/tribal distinction in considering challenges to Indian preferences.

scrutiny given to racial classifications in other, non-Indian contexts.

Granting preferences by means of these purely racial classifications would raise serious constitutional problems under the equal protection component of the Fifth Amendment. Although the Supreme Court has yet to speak with one voice on this issue, a plurality of the Court has held that express racial classifications may be employed only to further a compelling governmental interest, and must also be "narrowly tailored" to further that interest. Wygant v. Jackson Bd. of Education, 476 U.S. 267, 274 (1986) (plurality opinion). See also id. at 285-87 (O'Connor, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980); University of California Bd. of Regents v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.).

The Wygant plurality identified only rectification of prior discrimination by the government unit involved as a governmental interest that is clearly sufficiently compelling to justify reliance on racial classifications. Wygant, supra, 476 U.S. at 274. In this regard, the "Court never has held that societal discrimination alone is sufficient to justify a racial classification." Id. Thus, under the Wygant plurality's standard, the purely racial classifications present in the Act could be justified only if the OIE had historically discriminated against Indians. However, even assuming such discrimination had occurred, and thus that the purely racial classifications furthered a compelling state interest, the classifications are not narrowly tailored to remedying past discrimination, and are thus unconstitutional.[6]

The Supreme Court has indicated that, in determining whether a remedy is narrowly tailored, a number of factors are relevant: among them, the necessity for the relief and the efficacy of alternative remedies; the relationship of any numerical requirements to available minority members in the relevant market; the availability of meaningful waiver provisions (particularly where members of the preferred group have not been actual victims of discrimination); the extent to which the remedy trammels the interests of innocent third parties; and the planned duration of the remedy. E.g., Fullilove, supra, 448 U.S. at 481-82; Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 477-79

[6] We note that, after the OLC opinion was prepared, the Supreme Court decided Richmond v. Croson Co., No. 87-998 (Jan. 23, 1988). That decision emphasized that only those racial classifications that are designed to remedy prior discrimination, and are narrowly tailored to that end, will withstand strict constitutional scrutiny. The Croson decision thus provides further support for the OLC opinion.

(1986) (plurality opinion); id. at 484-86 (Powell, J., concurring).

No consideration seems to have been given to whether non-racial alternatives would have achieved the evidently desired result. Moreover, the purely racial classifications create a broad "overinclusive" racial preference that can apply in absolutely every case, to benefit every otherwise qualified applicant who fits within the racial classifications, and to disadvantage every otherwise qualified applicant who does not satisfy the racial criteria.[7] The classifications, moreover, operate to benefit many distinct groups, without reference to whether any individual within a specific statutory racial category (Aleuts, for example) ever suffered from any of the (assumed) historical discrimination. Such a broad brush approach is by definition not narrowly tailored, particularly in the absence of waiver provisions. See Wygant, supra, 476 U.S. at 284 n.13 (criticizing affirmative action plan for its "undifferentiated nature"); Fullilove, supra, 448 U.S. at 486-87 (facial challenge to "overinclusive" racial preference rejected on ground that "limit[ing]" waiver and exemption provisions cured overinclusiveness).[8] The preference by its terms is permanent, and

[7] Indeed, the sweeping and mandatory nature of the purely racial preference further distinguishes it from the use of race as a "plus" factor, sanctioned in Bakke, supra. See, e.g., 438 U.S. at 317 (opinion of Powell, J.).

[8] Section 5341(c) also provides that the preference is to be "implemented in the same fashion" as the veterans' preference established by 5 U.S.C. 2108(3). We are informed by the Department of Education that in the vast majority of cases, application of the veterans' preference results in qualified veterans being chosen over equally qualified non-veterans. In certain cases, however, the Department of Education evidently reserves the ability not to select a qualified veteran, due to supervening management concerns. It is perhaps arguable that the Indian preference in the Act could be implemented in such a way as to preserve some administrative flexibility. However, given the totality of the factors employed by the Supreme Court in determining whether a remedy is narrowly tailored, we do not believe that this limited flexibility, standing alone, is sufficient to render the purely racial classifications constitutional.

Furthermore, the Court sanctioned the waiver provisions in Fullilove because they provided "a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress . . . ." 448 U.S. at 487. The Department of Education's administrative

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will continue to operate indefinitely into the future, long after the effects of the (assumed) historical discrimination have been remedied. The preference also appears to trammel the rights of innocent third parties. Each of these characteristics of the Act indicates that the Act's racial classifications transgress constitutional requirements as enunciated by the Supreme Court.[9]

Accordingly, we believe that the racial classifications contained in the Act and in the incorporated regulations are unconstitutional under Supreme Court precedent, even assuming a history of discrimination against Indians by the OIE. The OIE may nonetheless implement Section 5351(4)(A) and 25 C.F.R. 5.1(a), constituting those portions of Section 5351 and the incorporated regulations that do not contain purely racial classifications, and thus are not constitutionally suspect.[10] Further, the Secretary of Education is free to adopt additional regulations defining "Indian" for purposes of the preference,

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[8](...continued)
flexibility under the Act, however, appears designed to recognize more general management concerns, rather than in any way serving to insure that racially-based classifications are only employed to remedy actual instances of discrimination. That flexibility, therefore, cannot be viewed as serving to render the preferences contained in the Act more "narrowly tailored" for constitutional purposes.

[9] Even assuming that in a given case the Act could be applied in accordance with the Constitution, that alone is not sufficient to rebut a constitutional challenge. E.g., as the Court indicated in Fullilove, a statute that is challenged as being overbroad on its face "cannot pass muster" unless the Court is able to conclude that the overbroad statute will be limited in its application to accomplishing proper remedial objectives. 448 U.S. at 486-87.

[10] The Act also grants a one-time preference to individuals who "are not Indians," "are serving within the Office of Indian Education on the date of enactment of this Act," and "desire to take another position in the Department of Education which is not within the Office of Indian Education and for which there is a vacancy." Section 5341(c)(2). Although this provision appears to be intended, in part, to compensate for the effects of the Indian preference, this one-time preference is also constitutionally suspect, but may be sustainable if extended to include all non-tribal Indians as well and if it is limited to creating openings for the constitutionally legitimate tribal preferences. We have no evidence, however, to indicate that Congress intended the non-Indian preference to also include non-tribal Indians.

pursuant to Section 5351(4)(E), so long as those regulations are not otherwise contrary to law and do not offend the Constitution.

We hope that the November 30 briefing and the foregoing statement of the Department's position on the constitutionality of the preferences contained in the Act are sufficient to satisfy your oversight interest. If you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Thomas M. Boyd
Assistant Attorney General